THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.

Paper No. 20

UNITED STATES PATENT AND TRADEMARK OFFICE

_____

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

_____

Ex parte PAUL J. SERBIAK, ANNAMARIA CESCO-CANCIAN, JULIE K. FREDRICK and ROBERT J. PEERENBOOM

_____

Appeal No. 97-1027
Application No. 08/218,954[1]

_____

ON BRIEF

_____

Before McCANDLISH Senior Administrative Patent Judge, and McQUADE and NASE, Administrative Patent Judges.

McCANDLISH, Senior Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on an appeal from the examiner's final rejection of claims 30 and 32 through 42. No other claims are

[1]Application for patent filed March 28, 1994. According to appellants, this application is a continuation of Application No. 08/048,640, filed April 16, 1993, abandoned, which is a continuation of Application No. 07/811,388,filed December 20, 1991, now U.S. Patent No. 5,219,341, issued March 28, 1995.

pending in the application.

Despite the fact that claim 40 has been included in the statement of the appealed claims in appellants' notice of appeal (paper No. 17), no specific rejection is found in the examination of this application leading up to and including the final rejection (paper No. 13) or in the examiner's answer (paper No. 19). In short, no specific rejection of claim 40 appears to have been made in the examination of this application. On the record before us, we therefore dismiss the appeal as to claim 40 for lack of jurisdiction inasmuch as no rejection or other adverse decision of claim 40 is before us. See 35 U.S.C. § 7(b).

Appellants' invention relates to an absorbent article and more particularly to a sanitary napkin having first, second and third absorbent layers (12, 13 and 15) disposed between a liquid permeable cover (11) and a liquid impermeable baffle (14). According to one feature of appellants' invention, the third layer (15), which lies between the first and second layers (12, 13), has a transverse wicking rate which is less than that of the second layer (13), and the second layer (13) has a transverse wicking rate which is greater than that of the first layer (12) so that body fluid is transversely routed in the second layer

faster than in either the first or third layers to enable a user to determine by observation if the napkin is approaching its maximum fluid capacity. A copy of claim 32, which is exemplary of the claimed subject matter, is appended to this decision.

The following references are relied upon by the examiner as evidence of anticipation and obviousness in support of his rejections under 35 U.S.C. §§ 102, 103:

Ness	4,880,419	Nov. 14, 1989
Osborn, III	4,950,264	Aug. 21, 1990

Claim 30 stands rejected under 35 U.S.C. § 102(b) as being anticipated by Ness, claims 32, 33, 38 and 42 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Osborn and claims 34 through 37, 39 and 41 stand rejected under 35 U.S.C. § 103 as being unpatentable over Osborn. Reference is made to the final office action (paper No. 13) for details of these rejections.

We have carefully considered the issues raised in this appeal together with the examiner’s remarks and appellants’ arguments. As a result, we conclude that the rejections of appealed claims 30, 32 through 39, 41 and 42 cannot be sustained.

Considering first the § 102(b) rejection of claims 32, 33, 38 and 42, it is well establish patent law that for a reference

to be properly anticipatory, each and every element of the rejected claim must be found either expressly described or under the principles of inherency in the applied reference. See, inter alia, RCA Corp. v. Applied Digital Data Systems, Inc., 730 F.2d 1440, 1444, 221 USPQ 385, 388 (Fed. Cir. 1984).

In the present case, all three of the independent claims 32, 38, and 42 require in substance that the transverse wicking rate of the second absorbent layer be higher than the transverse wicking rates of the first and third absorbent layers thereby enabling the absorbed body fluid to be transversely routed in the second layer faster than in either the first or the third layer. In support of his position that this limitation is met by the Osborn patent, the examiner has made the following findings with regard to this reference:

> The embodiment of Figure 4 of Osborn comprises a first absorbent layer 34; a second absorbent layer 28 with an oval configuration, a thickness less than that of first absorbent layer 34 (Figure 2), a greater transverse width, and a higher transverse wicking rate (column 8, lines 29-36); a third absorbent layer 31 with a transverse width intermediate that of the first and second absorbent layers; and attachment panels 71. That the second absorbent layer 28 has a greater wicking rate than the third absorbent layer 31 is evident from discussion of the intended functioning of the device (column 8), particularly in that layer 31 “improves lateral wicking” (column 8, lines 8-9)

> whereas layer 28 "greatly improves lateral wicking" (column 8, lines 32-33; emphasis added).

Contrary to the examiner's position as quoted supra, the mere disclosure in Osborn that the patentee's wipe acquisition sheet 28, which overlies the intermediate wet-laid tissue layer 31 and the lowermost laminate core 34 in Osborn's sanitary napkin, "greatly improves lateral wicking of exudates over the absorbent core 34" does not necessarily mean that the transverse wicking rate of sheet 28 is greater than the transverse wicking rate of the underlying tissue layer 31. This part of the Osborn specification merely states that the acquisition sheet greatly improves lateral wicking with respect to lowermost core 34. It is silent as to the relative transverse wicking rates of sheet 28 and the tissue layer 31.

As a result, it cannot be said that the claimed relationship of the wicking rates for the second and third absorbent layers is the necessary result flowing from Osborn's disclosure that sheet 28 greatly improves the lateral wicking of exudates over the core 34. Therefore, the claimed relationship of the wicking rates for the second and third absorbent layers is not expressly or inherently met by Osborn. See In re Oelrich, 666 F.2d 578, 581, 212 USPQ 323, 326 (CCPA 1981). It follows that Osborn is not a

proper anticipatory reference for claims 32, 33, 38 and 42.

For the foregoing reasons, we must reverse the § 102(b) rejection of claims 32, 33, 38 and 42. We must also reverse the § 103 rejection of claims 34 through 37, 39 and 41 because we find nothing that would have suggested the claimed relationship of the transverse wicking rates for appellants' second and third absorbent layers.

With regard to the § 102(b) rejection of claim 30, this claim requires that the transverse wicking rate of the second absorbent layer be greater than the transverse wicking rate of the first absorbent layer and further that transverse wicking rate of the third absorbent layer be less than the transverse wicking rate of the second absorbent layer. Contrary to the examiner's position, we find no disclosure in Ness which expressly or inherently meets the claimed limitation pertaining the relationship of the transverse wicking rates for the absorbent layers. As a result the § 102(b) rejection of claim 30 also must be reversed. See RCA Corp. v. Applied Digital Data Systems, Inc., 730 F.2d at 1444, 221 USPQ. at 388.

The examiner's decision rejecting appealed claims 30, 32 through 39, 41 and 42 is reversed, and the appeal as to claim 40 is dismissed for lack of jurisdiction.

REVERSED

HARRISON E. McCANDLISH Senior Administrative Patent Judge	)	
JOHN P. McQUADE Administrative Patent Judge	)	BOARD OF PATENT APPEALS AND INTERFERENCES
JEFFREY V. NASE Administrative Patent Judge	)	

Thomas J. Connelly
Kimberley-Clark Corporation
Patent Department
401 North Lake Street
Neenah, WI 54956